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No. 83-1922

In the Supreme Court of the United States

OCTOBER TERM, 1984

MENOMINEE TRIBE OF INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this damage action brought by the Menominee Tribe of Indians against the United States based on asserted mismanagement of the Tribe's forest resources is barred by the six-year statute of limitations in 28 U.S.C. 2501.

2. Whether deed restrictions included in the Menominee Tribe's termination plan adopted pursuant to the Menominee Termination Act give rise to a claim for breach of trust that may be brought under 28 U.S.C. 1491 or 1505.

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OPINIONS BELOW

The opinion of the court of appeals with respect to the "deed restrictions" claim (Pet. App. 1a-12a) is reported at 726 F.2d 712, and the trial judge's opinion with respect to that claim (Pet. Supp. App. 1a-196a) is unreported. The opinion of the court of appeals with respect to the "forest mismanagement" claim (Pet. App. 13a-23a) is reported at 726 F.2d 718, and the trial judge's opinion with respect to that claim (Pet. App. 197a-330a) is unreported.

JURISDICTION

The judgment of the court of appeals with respect to the deed restrictions claim was entered on Decem-

ber 30, 1983, and the judgment of the court of appeals with respect to the forest mismanagement claim was entered on January 24, 1984. A petition for rehearing was denied on February 16, 1984 (Pet. App. 24a). On March 16, 1984, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 28, 1984, and the petition was filed on May 25, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Menominee Indian Reservation in Wisconsin was established by the Treaty of Wolf River of 1854, United States—Menominee Tribe, 10 Stat. 1064 *et seq.* (Pet. Supp. App. 8a n.12). A century later, in 1954, Congress implemented its then-current termination policy by enacting the Menominee Termination Act (ch. 303, 68 Stat. 250 *et seq.*), which provided for the elimination of federal supervision over the Menominee Tribe (the Tribe). Under the Termination Act, the Tribe was to formulate a plan for future control of tribal property and service functions theretofore undertaken by the United States. On or before April 30, 1961, the Secretary was to transfer to a tribal corporation or to a trustee chosen by him all property held in trust by the United States for the Tribe. The Termination Act further provided that, after transfer to the Tribe of title to property previously held in trust by the United States, tribal members were not to be entitled to special services performed by the United States for Indians and that all statutes specifically affecting Indians would no longer be applicable to the Tribe. The Act was fully carried out. See *Me-*

nominee Tribe v. *United States*, 391 U.S. 404, 408-409 (1968).[1]

2. Dissatisfied with Congress's termination decision and its results, the Tribe and certain of its representatives and members filed an action in the Court of Claims under 28 U.S.C. 1491 and 1505 on April 25, 1967. The central thrust of the claim was that passage and implementation of the Termination Act constituted a breach of trust owed by the United States to the Menominees.

On July 19, 1978, the trial judge filed an opinion and findings of fact on the question of liability, without determining damages (Pet. App. at 20a-124a, *Menominee Tribe* v. *United States*, 445 U.S. 950 (1980)). The trial judge concluded that the Menominee Termination Act was not in petitioners' best interest and was ill-advised and that passage of the Act constituted a breach of Congress's fiduciary obligation to petitioners (*id.* at 51a-54a).

The Court of Claims, sitting en banc, unanimously reversed. *Menominee Tribe* v. *United States* (*Menominee Basic*), 607 F.2d 1335 (Ct. Cl. 1979). The court did not reach the question whether there had been a breach of some duty by Congress in terminating federal supervision of the Menominee Tribe. Instead, the Court of Claims rested its holding on jurisdictional grounds. The court noted that the trial judge had "assumed without discussion that there was jurisdiction over all Indians claims for breach of trust, of whatever character, and made absolutely no distinction * * * between the actions of Congress set-

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[1] Subsequently, in the Menominee Restoration Act of 1973 (25 U.S.C. 903, *et seq.*), Congress restored federal recognition and supervision to the Menominee Tribe.

ting policy and directing conduct and the conduct of executive officials contrary to Congressional policy and directives" (*id.* at 1339 n.5). The Court of Claims drew such a distinction, however, and held that the controlling jurisdictional statutes, 28 U.S.C. 1491 and 1505, did not give it "authority to entertain a suit contending that a statute passed by Congress, though valid and constitutional, is nevertheless a breach of trust owed by the Federal Government to the Indians" (*id.* at 1339 (footnote omitted)). The Court of Claims remanded the case to the trial judge for reconsideration of certain issues to the extent they were not barred by its decision. 607 F.2d at 1338 n.2, 1347. This Court denied the Tribe's petition for a writ of certiorari to review the Court of Claims' holding that it was without jurisdiction over claims based on the enactment and implementation of the Termination Act. *Menominee Tribe* v. *United States*, 445 U.S. 950 (1980).

a. On remand, petitioners alleged in their "forest mismanagement" claim that the Secretary had mismanaged the Tribe's forest resources by failing to obtain from Congress an increase in the statutory limitation on the harvesting of timber that had been established by Congress in a statute passed in 1908 (Pet. Supp. App. 41a-43a). The trial judge rejected the government's argument that this claim, filed on April 25, 1967, was barred by the six-year statute of limitations under 28 U.S.C. 2501 because the alleged mismanagement resulting from underproductivity commenced in 1952 (Pet. Supp. App. 236a-238a). The trial judge awarded the Tribe $7,195,915 for damages occurring both before and after the effective date of the termination on April 30, 1961 (Pet. App. 13a & n.1).

The court of appeals reversed (Pet. App. 13a-23a). The court of appeals held that the claim for damages accruing prior to April 25, 1961—six years prior to the filing of this suit—was barred by the six-year statute of limitations in 28 U.S.C. 2501 (Pet. App. 20a). The court held that the existence of a trust relationship between the United States and the Tribe prior to termination did not toll the running of the limitations period and that the facts regarding the alleged undercutting of the forest were not inherently unknowable to the Tribe (*id.* at 17a-20a). The post-termination damage claim was based on the Tribe's argument that the injuries to the Menominee Forest were perpetuated into the post-termination period by the 1961 Management Plan (Pet. App. 20a). The court of appeals held, however, that because the Management Plan was "an integral part of the termination ordered by Congress in the Termination Act" (Pet. App. 20a), under *Menominee Basic*, the Court of Claims and Claims Court had no jurisdiction over claims based on the contents of that Plan (Pet. App. 20a-22a).

b. In the "deed restriction" claim, the Tribe argued that two provisions in the deed by which the United States conveyed to the Tribe the property previously held by the United States in trust for the Tribe constituted either a breach of fiduciary duty or a taking of property for which the Fifth Amendment required the payment of compensation. One of the deed provisions required that the forest be managed on a sustained-yield basis until released from that requirement under the laws of Wisconsin or by Act of Congress (Pet. App. 3a). The second provision barred the transfer or encumbrance of the lands by the Tribe for a period of 30 years without

the prior approval of the State Conservation Commission and the Governor of Wisconsin, unless prior to that time the forest was released from the sustained-yield requirement under the laws of Wisconsin (*ibid.*). The trial judge agreed with the Tribe that these deed restrictions amounted to either a breach of fiduciary duty or Fifth Amendment taking for which compensation could be awarded by the Court of Claims.

The court of appeals, however, reversed. It reasoned that under the Court of Claims' prior decision in *Menominee Basic*, jurisdiction did not lie under 28 U.S.C. 1491 and 1505 over the Tribe's claim for damages resulting from the congressional decision to terminate federal supervision over the Menominees. The court found that the deed restrictions to which the Tribe objected "fully accorded" with the Termination Act and therefore likewise "gave rise to no justiciable claim for breach of trust" (Pet. App. 5a). The court also rejected the contention that the deed restrictions resulted in a Fifth Amendment taking. The court explained that the sustained yield requirement was simply a "continuation of a regulatory requirement which had long existed for the Menominee forest and which Congress considered important for the future economic health of the Tribe" (Pet. App. 9a) and that the 30-year restraint on alienation was lawful because "[r]estrictions on alienation are common with respect to Indian lands" and the United States "could lawfully condition the transfer of the land to the Tribe on the latter's agreement not to alienate the land for a period of thirty years" (*id.* at 11a (footnote omitted)).

ARGUMENT

The judgments of the court of appeals are correct and do not conflict with any decision of this Court or any court of appeals. Petitioners raise no constitutional claim (Pet. i) and do not challenge (see Pet. 21) the correctness of the Court of Claims' decision in *Menominee Basic*, which this Court previously declined to review. Petitioners now simply challenge the court of appeals' application of the *Menominee Basic* ruling and the six-year statute of limitations to the particular circumstances of the two claims involved here. These rulings raise no issues of general importance warranting review by this Court.

1. Petitioners first contend (Pet. 14-20) that the court of appeals erred in holding that their claim based on alleged mismanagement of the forest on or before April 25, 1961—six years before this suit was filed on April 25, 1967—is barred by the six-year statute of limitations in 28 U.S.C. 2501. That section provides that "[e]very claim" of which the Claims Court has jurisdiction "shall be barred" unless brought within six years after such claim "first accrues."

a. As an initial matter, quite aside from the bar of the statute of limitations, the Claims Court could not entertain the forest mismanagement claim under 28 U.S.C. 1491 and 1505. The "mismanagement" the trial judge found for the period prior to April 1961 was essentially that the forest was undercut because timber was not harvested in excess of 20 million board feet (MMBF) annually (Pet. Supp. App. 329a). However, that 20 MMBF limitation was imposed by Congress in the Act of Mar. 28, 1908, ch. 111, 35 Stat. 51 *et seq.* For the reasons given by the Court of Claims in *Menominee Basic*, the Court

of Claims (and now the Claims Court) did not have jurisdiction under 28 U.S.C. 1491 and 1505 over a claim for damages based on a determination by Congress itself embodied in a duly enacted law. Petitioners seek to avoid this conclusion by arguing that damages nevertheless may be recovered for the failure by Interior Department officials to seek an amendment of the statutory limitation after they allegedly determined that the 20 MMBF ceiling was too low. See Pet. 10-11. Nothing in 28 U.S.C. 1491 or 1505 suggests that Congress intended to provide for the award of damages based on the Executive's failure to seek an amendment of the terms of an existing law.

Section 1491(a)(1) provides for recovery on claims against the United States "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." [2] That language, referring to existing provisions of law, does not include within its sweep acts or omissions of the Executive in proposing to Congress that it change existing law. When performing the latter function, the President and those acting on his behalf are not executing the law; they are instead participants in the legislative process, pursuant to the authority conferred on the President by Article II, Section 3 of the Constitution to recommend for Congress's consideration "such Measures as he shall judge necessary and expedient." See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 587 (1952). The performance or nonperformance of that function would appear to

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[2] Section 1491(a)(1) also provides for the award of damages based upon "any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort," but petitioners do not contend that jurisdiction lies under these provisions.

present a political question, because the recommending function is textually committed to a coordinate branch (see *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)) by virtue of the provision for recommendation by the President of such measures as "he"—not a court—"shall judge necessary and expedient." And even if the Executive had recommended legislation to raise the 20 MMBF limitation, it would be entirely speculative whether Congress would have enacted it and thereby alleviated the "injury" caused by the 1908 Act.

Against this background, Congress cannot be held to have created a cause of action for damages based upon the Executive's role in the legislative process absent a clear and unambiguous expression of congressional intent to do so. No such expression is present here. To the contrary, the language of 28 U.S.C. 1491 plainly does not embrace such a cause of action. The scope of 28 U.S.C. 1505, which provides for damage actions by Indian tribes, is identical (see *United States* v. *Mitchell* (*Mitchell I*), 445 U.S. 535, 539-540 (1980); *United States* v. *Mitchell* (*Mitchell II*), No. 81-1748 (June 27, 1983), slip op. 5-6 n.8) and therefore likewise does not authorize the recovery of damages on the basis of the Executive's failure to seek a statutory amendment.

The conclusion that the Court of Claims and Claims Court had no jurisdiction over petitioners' claim in this regard also is compelled by the decision in *Menominee Basic*. There the Court of Claims held that "the United States cannot be held liable for Interior's affirmative actions or passive omissions with respect to the passage and implementation of the Termination Act." 607 F.2d at 1345. The same must be true as regards Interior's actions or omis-

sions with regard to Congress's failure to pass an amendment to the 1908 Act that imposed the harvest limitation.

b. In any event, the court of appeals correctly concluded that petitioners' claim based on alleged forest mismanagement prior to April 26, 1961 is barred by the statute of limitations in 28 U.S.C. 2501. Petitioners seek to avoid the application of the statute of limitations by arguing (Pet. 17-20) that the running of the limitations period should be deemed tolled because of the existence of a trust relationship between the United States and the Tribe and because petitioners did not have knowledge of the government's assertedly wrongful conduct. Neither argument has merit.

The suggestion that the six-year statute of limitations is inapplicable because of the existence of a "trust" relationship would have the effect of rendering the limitations period inapplicable with respect to the vast majority of claims brought by Indian tribes under 28 U.S.C. 1505, since most plaintiff tribes would have a relationship with the United States that could be characterized as one of "trust." Congress clearly did not intend to exempt tribal claims from the generally applicable six-year limitations provision in this manner. To the contrary, it provided that "[*e*]*very claim* of which the United States Claims Court has jurisdiction" is barred unless brought within six years (28 U.S.C. 2501 (emphasis added)), and the legislative history of 28 U.S.C. 1505 makes clear that tribal claims are "subject to the same conditions and limitations, and the United States shall be entitled to the same defenses both at law and in equity, . . . as in cases brought in the Court of Claims by non-Indians under [28 U.S.C.

1491].'" H.R. Rep. 1466, 79th Cong., 1st Sess. 13 (1945), quoted in *Mitchell I*, 445 U.S. at 539.

Also unavailing is petitioners' attempt to invoke the holding in *Urie* v. *Thompson*, 337 U.S. 163, 169-170 (1949), that a claim under the Federal Employee Liability Act does not accrue until the injury has manifested itself and that the statute of limitations therefore does not begin to run while the injury is "inherently unknowable" and the plaintiff accordingly can show "blameless ignorance" of it. Even assuming that this principle is applicable in suits against the United States such as that involved here, it is of no assistance to petitioners in the circumstances of this case.[3]

The injury to the forest resulting from undercutting clearly was not "inherently unknowable," as in *Urie* v. *Thompson*, *supra*. The trial judge found

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[3] With one exception, all of the decisions cited by petitioners at Pet. 19 n.39 are Federal Tort Claims Act cases in the special context of medical malpractice (see also *United States* v. *Kubrick*, 444 U.S. 111, 122 (1979)), and thus do not have direct application here. The one exception is *Japanese War Notes Claimants Ass'n* v. *United States*, 373 F.2d 356 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967), which involved a claim under the Tucker Act based on the Army's distribution of counterfeit Japanese currency in the Philippines during the Second World War. Any conflict with that decision of the Court of Claims and the decision below would essentially be an intracircuit conflict not warranting this Court's review. In any event, the court below considered the Court of Claims' decision in the *Japanese War Notes Claimants* case and correctly found it inapposite here on the ground that the alleged injury of which petitioners complain was neither concealed by the United States nor "inherently unknowable" (Pet. App. 17a-18a).

that petitioners' claim first arose on January 1, 1952, when the Department of the Interior published the Menominee Forest Stand Structure Analysis, which the district court determined gave notice that the harvest limitation of 20 MMBF annually, established by Congress in 1908, caused underproductivity in the forest (Pet. Supp. App. 329a). That document necessarily also put petitioners on notice of their claim of underproductivity. In addition, as court of appeals observed (Pet. App. 18a):

> The overwhelming weight of the evidence shows that the Indians were not so invincibly ignorant that they did not even know enough to make inquiry or seek advice. In 1956, acting on a resolution of the Menominee Council, Congress made one increase in the statutory harvest limitation (said by the Indians to be insufficient). The Tribe had successfully carried on the earlier suit (on another basis) against the United States for forest mismanagement and entered into a substantial settlement in 1951. *Menominee Tribe of Indians* v. *United States*, 117 Ct. Cl. 442 (1950); 118 Ct. Cl. 290 (1951); 119 Ct. Cl. 832 (1951). At least from 1954 onward, the Indians and their attorneys participated actively in the Congressional consideration of termination and in the preparation of the termination plan. Without doubt the Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claims. In short, "[t]he facts were all available", and the running of limitations would not be tolled as if they were "unknowable". *See Affiliated Ute Citizens* v. *United States*, * * * 199 Ct. Cl. 1004 (1972).

Moreover, throughout the termination process, petitioners were ably represented by "skilled attorneys." *Menominee Basic*, 607 F.2d at 1346. The same attorneys who represented petitioners in their forest mismanagement claim in *Menominee Tribe* v. *United States*, 91 F. Supp. 917 (Ct. Cl. 1950), and during the termination process, 26 Fed. Reg. 3727 (1961), also represented them in the trial of this action (Pet. App. 198a). For this reason as well, petitioners' assertion that the running of the statute of limitations should be tolled because of their ignorance and lack of notice is without merit. In fact, petitioners appear to concede that the circumstances of this case do not satisfy the rule of *Urie* v. *Thompson*, *supra*, observing that "[a] non-Indian might not be able to avoid the statute of limitations on the ground of 'blameless ignorance' if the facts of the government's wrong were discoverable through the use of expert assistance or other means" (Pet. 17-18). They simply argue (Pet. 18) that the standard should be relaxed for Indian claimants. That argument is flatly inconsistent with the unambiguous congressional intent underlying 28 U.S.C. 1505 that tribal claims are to be subject to the *same* limitations as claims by non-Indians. See pages 9, 10-11, *supra*.[4]

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[4] Petitioners' reliance on this Court's 1983 decision in *Mitchell II* in support of a special tolling rule is misplaced. The *Mitchell* decisions involved the existence of a cause of action against the United States, not the application of the statute of limitations to such a claim. Moreover, the Court in *Mitchell II* reiterated the holding of *Mitchell I* that 28 U.S.C. 1505 "provides tribal claimants the *same* access to the Court of Claims provided to individual claimants under 28 U.S.C. § 1491" (slip op. 5-6 n.8 (emphasis added), citing 445 U.S. at 538-540). In *Mitchell I*, at the pages cited, the Court made

2. The court of appeals also correctly concluded that the Court of Claims—now the Claims Court—did not have jurisdiction over petitioners' claim for damages resulting from two restrictions in the deed by which the land was conveyed to the Tribe. The provision for the forest to be managed on a sustained-yield basis was a continuation of the regime under the 1908 Act and was required by the Termination Act itself, which provided that "[t]he [termination] plan shall contain provision for protection of the forest on a sustained yield basis" (Pub. L. No. 85-490, § 1(b), 72 Stat. 291; Pet. App. 28a). Under *Menominee Basic*, that congressional judgment cannot form the basis for liability by the United States under 28 U.S.C. 1491 and 1505. And if there could be any doubt on the question, the Termination Act itself explicitly provided that the "sustained yield management requirement * * * shall not be construed by any court to impose a financial liability on the United States" (§ 1(b), 72 Stat. 291; Pet. App. 28a-29a).

Petitioners contend (Pet. 23 n.45), however, that they are not really objecting to the sustained-yield provision as such, but rather are objecting to what they assert was a requirement that the sustained-yield provision be administered for the benefit of the State of Wisconsin rather than the Indians. There is no support for this assertion. To be sure, the plan did state that the deed would contain the sustained-yield covenant "for the benefit of the State of Wisconsin" (Pet. App. 3a). But as the court of appeals

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clear that Indians are to be subject to the same limitations and defenses as non-Indians. Petitioners' suggestion of a special tolling rule for Indian claimants therefore is inconsistent with the *Mitchell* decisions.

held, this reference "merely gave the State the power to enforce the restrictions if they were violated" (*id.* at 8a n.9); it did not purport to give the State of Wisconsin authority to insist upon administration of the forest in a manner that was contrary to the Tribe's interest. The deed also provided that the sustained-yield requirement would continue until the lands were released from it under the laws of Wisconsin or by Act of Congress (*id.* at 3a). This provision also is consistent with the Termination Act, which required the Secretary to ensure that the termination plan "conforms to applicable Federal and State law" (§ 1(b), 72 Stat. 290). Moreover, as the court of appeals observed (Pet. App. 6a), if the Secretary was authorized to insist upon the sustained-yield restriction on a permanent basis after conveyance, as he plainly was, it is difficult to see how the provision for an *earlier* release from that restriction could have harmed the Tribe. And as the court of appeals further noted (*id.* at 6a n.6), even if the deed restriction had been lifted by state law, the Tribe would not have been compelled to abandon the sustained-yield program.

Similarly, the 30-year restraint on alienation does not give rise to a cause of action for damages. Although that provision was not explicitly mandated by the Termination Act itself, the provision was, as the court of appeals concluded, "fully consonant" with the Act. It was intended to enforce the sustained yield requirement that *was* mandated by the Termination Act and was part of an arrangement under which the Tribe received a state tax advantage and thus served to promote the economic success of the Tribe. See Pet. App. 7a. Because the 30-year restraint on alienation was consistent with, not in vio-

lation of, the Termination Act, it cannot, under *Menominee Basic*, give rise to a damage action.

Indeed, in light of petitioners' repeated insistence that termination was ill-advised and in light of the resumption of the federal trusteeship over the property pursuant to the Restoration Act, it is quite ironic that petitioners should object to the 30-year restraint on alienation, which had the effect of ensuring the retention of the principal tribal asset after termination until passage of the Restoration Act in 1973. We would have thought that any cause of action for damages based on this deed restriction necessarily abated upon passage of the Restoration Act and return of the land to federal trusteeship with the consent of the Tribe. In any event, given the passage of the Restoration Act, any questions regarding this and other provisions in the deed implementing the now-repudiated Termination Act are of no continuing importance even as regards the Menominee Tribe itself. Far less are they of a broader importance warranting this Court's consideration.[5]

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[5] Petitioners assert (Pet. 22-23) that damages may be awarded for the federal government's alleged failure to provide "such reasonable assistance as may be requested by officials of the tribe in the formulation of the plan," as the Secretary was authorized to provide by Section 7 of the Menominee Termination Act, 68 Stat. 251. This contention is insubstantial. First, Section 7 merely *authorized*—it did not direct—the Secretary to furnish such assistance. This is not language that " 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained' " (*Mitchell II*, slip op. 11, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976), and *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)), especially in the context of a statute that was intended to terminate federal responsibility for the Tribe. Second, as the court observed in *Menominee*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Basic (607 F.2d at 1346), there is no indication that any request by the Tribe for assistance was turned down, and petitioners cite no such instance. Third, as the court also observed in *Menominee Basic* (*ibid.*):

> In view of the precise wording of the Secretary's authority as to assistance, we cannot agree that Interior was required to proffer advice or assistance not sought by the Menominees (who were represented by skilled attorneys) and perhaps not wanted.

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